MUTHUKRISHNAN A/L SUPPIAH

v.

MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & 2 ORS. AND ANOTHER APPLICATION

HIGH COURT MALAYA, MUAR
TUAN LOW HOP BING JC
[CRIMINAL APPLICATIONS NOS. 44-3-1994 & 44-8-1994]
26 AUGUST 1994

PREVENTIVE DETENTION: Habeas Corpus - Detention under ss. 3 & 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether lawful - Representation by applicants to the Advisory Board - Whether considered - Affidavit evidence that Advisory Board had "heard" representations - Whether process of hearing included process of considering - Section 10(1) & (2) of the Act - Whether complied with.

WORDS AND PHRASES: "to hear" - "to consider".

The applicants were detained under ss. 3 & 6(1) respectively of the Dangerous Drugs (Special Preventive Measures) Act 1985. They applied for a writ of *Habeas Corpus* and argued before the Court that their detention by the respondents thereof was illegal, being in contravention of the provisions of s. 10 of the Act. In effect, s. 10(1) made it incumbent on the Advisory Board (the Board), upon representations being made to it pursuant to s. 9, to consider the said representations and to make recommendations thereon to the Yang Di Pertuan Agung. It was submitted by Counsel for the applicants that the Board in these two cases had never considered the representations of the applicants and that being the case, the strict mandatory requirements of the said s. 10(1) had not been complied with resulting in the detention of the applicants herein being illegal and null and void.

The evidence showed that in his affidavit, the Secretary of the Advisory Board had deposed, *inter alia*, that "The applicant's representation was heard by the Advisory Board on 7 July 1993. On 14 July 1993 the Advisory Board made recommendations thereon to the Yang Di-Pertuan Agung. After considering the recommendations of the Advisory Board, the Yang Di-Pertuan Agung has confirmed the Order made by the Minister against the applicant...".

The primary issue that arose was whether in the circumstances, bearing in mind the aforesaid affidavit evidence, the Advisory Board could be said to have not considered the relevant representations of the applicants, and hence, whether their detention herein was illegal, being in contravention of s. 10 of the Act.

Held:

[1] Common sense should prevail in giving proper meaning to the words "to hear". The words "to hear" must mean "to listen to", "to give audience to" and it also means "to attend and listen to" or "to listen to judicially in a Court of law", or "to give one a hearing" or "to try a person or case". By reference to the ordinary meaning of the word "hear", it seems clear therefore, that one cannot simply "hear" a representation without considering it.

[2] In the instant cases, the Board's process of hearing the applicants' representations can only mean that the Board has intervened in relation to the representations of the applicants and considered questions relating to or arising out of the representations so as to enable the Board to determine or decide on the recommendations to be made to the Yang Di-Pertuan Agung. The process of hearing necessarily includes the process of considering i.e taking into account all the issues raised in the applicants' representations which enable the Board finally to come to an adjudication upon it and therefore to make recommendations thereon to the Yang Di Pertuan Agung. In the circumstances the Board has not contravened s. 10(1) of the Act as alleged. Both the applicants, hence, have been lawfully detained.

[3] The provisions of the Evidence Act 1950 in relation to hearsay rule do not apply to affidavits. This is made clear by s. 2 of the Act. This being the case, the submission that the affidavit of the Secretary has offended the hearsay rule in the Evidence Act 1950 cannot be upheld.

[Applications dismissed].

Cases referred to:
Najar Singh v. Government of Malaysia & Anor. [1974] 1 MLJ 138 ***(foll)***
Re Tan Boon Liat @ Allen & Anor. [1977] 2 MLJ 108 ***(foll)***
Merlimau Pegoh Limited v. Collector of Land Revenue, Jasin [1969] 2 MLJ 248 ***(foll)***
Zakaria Bin Jaafar v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. And Another Application [1989] 3 MLJ 316 ***(foll)***
Rie-Del-de-Hean AG v. Liew Keng Pang [1989] 2 MLJ 400 ***(refd)***

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(a), (b), (c), (3), 5, 6(1), 10(1), (2)
Evidence Act 1950, s. 2
Federal Constitution, Article 151(1)(b)
Evidence Act, s. 1 (India)
Evidence Act, s. 2(1) Parts I, II, III (Singapore)

Other sources referred to:
"Readers' Digest Universial Dictionary" 1990 Edn. at p. 711
Shorter Oxford Dictionary

For the applicant - Chelva R. Suppiah; M/s. Chelva R. Suppiah & Co.
For the respondent - Mahmud bin Abdullah, Senior Federal Counsel

JUDGMENT

Low Hop Bing JC:
These two application are for writs of *habeas corpus* to release the applicants who have been detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act"). By consent of both parties hereto, these two applications are heard together.

The application in Criminal Application No. 44-3-1994 ("the first applicant") was released by the Muar High Court on a writ of *habeas corpus* issued on 15 September 1992. He was, however, rearrested on the same date outside the Simpang Rengam Prison. The first applicant was subsequently detained in the police lock-up of Klang Police District Head Office for 60 days. The first applicant alleges that during the 60 days of his detention, police officers holding the ranks of Inspector, Assistant Superintendent

of Police, Deputy Superintendent of Police and other police officers appointed by the Inspector-General of Police did not perform their duties as required under s. 3(a), (b) and (c) of the Act. That being the case, the first applicant alleges that the authorities which had detained him for 60 days had contravened s. 3(a), (b) and (c) of the Act. The first applicant also alleges that the investigating officer who carried out the investigation in this case has failed to produce a copy of the report of the Enquiry Officer and the Minister of Home Affairs and that such failure to produce the report has therefore contravened s. 3(3) of the Act. The first applicant further alleges that the Advisory Board ("the Board") has not informed him of the recommendation to the Yang di-Pertuan Agong and that such omission has therefore contravened s. 10(1) of the Act.

The applicant in Criminal Application No. 44-8-1994 ("the second applicant") through the affidavit in support affirmed by his father states that he was arrested at No. 81 Taman Okid, Jalan Bakri, Muar and was detained for the purpose of police investigation under s. 3 of the Act. It was alleged that the police officer did not inform him of the reason, either orally or in writing, of his arrest at all, or that he was arrested under s. 3 of the Act. It was further alleged that the arrest and the detention for 60 days did not comply with the provisions of the Act. The affidavit also stated that the enquiry conducted by the Enquiry Officer has contravened s. 5 of the Act. It was also alleged that although the board has considered his representation he was not informed of the decision. In a subsequent affidavit which was also affirmed by his father, the considering of his representation was varied to the hearing of his representation.

Learned Counsel for both the applicants and learned Senior Federal Counsel for the respondents herein agreed before the commencement of their submissions that there is only one question of law for the Court's determination i.e. whether the detention of the applicants herein was in contravention of the provisions s. 10 of the Act. That being the case, the allegations in relation to other contraventions by the detaining authorities have not been called into question and need not be considered by the Court.

The whole of s. 10 of the Act reads as follows:

> 10. Report of Advisory Board
>
> (1) Whenever any person had made representations under subsection (1) of s. 9 to an Advisory Board, the Advisory Board shall within three months from the date of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow, consider the representations and make recommendations thereon to the Yang di-Pertuan Agong.
>
> (2) Upon considering the recommendations of the Advisory Board under this section, the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister and every decision of the Yang di-Pertuan Agong shall, subject to s. 11, be final and shall not be called into question in any Court.

Learned Counsel for both the applicants submits that under s. 10(1) of the Act, the Advisory Board must do two things *viz*:

(a) consider the representations; and

(b) make recommendations thereon to the Yang di-Pertuan Agong.

In this context, learned Counsel further submits that the Advisory Board has never "considered the representations at all". In support of this submission, he relied upon

paragraph 4 of the affidavit of Encik Khalid bin Ahmad, the Secretary of the Advisory Board. Paragraph 4 of this affidavit reads as follows:

> 4. Representasi pemohon terhadap perintah tahanan yang dikenakan ke atasnya di bawah s. 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 (yang selepas ini disebut sebagai "Akta") telah diterima oleh Lembaga Penasihat pada 16 Jun 1993. Representasi pemohon telah didengar oleh Lembaga Penasihat pada 7 Julai 1993. Pada 14 Julai 1993, Lembaga Penasihat membuat syor-syor mengenai representasi tersebut kepada Yang di-Pertuan Agong. Setelah menimbangkan syor-syor Lembaga Penasihat, Yang di-Pertuan Agaong telah mengesahkan perintah tahanan yang dibuat oleh Menteri di bawah s. 6(1) Akta terhadap pemohon.

Translation:

> The applicant's representation on the detention order that was imposed upon him under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 was received by the Advisory Board on 23 November 1992. The applicant's representation was heard by the Advisory Board on 16 December 1992. On 5 January 1993, the Advisory Board made recommendations thereon to the Yang di-Pertuan Agong. After considering the recommendations of the Advisory Board, the Yang di-Pertuan Agong has confirmed the detention order made by the Minister against the applicant under s. 6(1) of the Act.

On the basis of paragraph 4 of the affidavit, learned Counsel for both the applicants submits that there is no evidence that the Board has ever **considered** the representation of both the applicants, although it has not been disputed and indeed it is common ground that the applicant's representation was **heard** by the Board.

The legal implication of the submission of learned Counsel for both the applicants is that the **hearing** of both the applicants' representations did not include and could not amount to the **considering** of the said representations. That being the case, the strict mandatory requirement of s. 10(1) of the Act imposed on the Board to **consider** the representations has not been complied with, thus resulting in the detention of both the applicants being illegal and null and void.

In further support of his submission, learned Counsel for both the applicants relies upon numerous dictionaries.

Learned Senior Federal Counsel, on the other hand, submits that the process of hearing includes the process of considering. Hence, in the **"Readers' Digest Universial Dictionary"** 1990 Edn. at p. 711, "hear" means "to listen to with favour; give consideration to." Further, he submits that in the recent unreported decision of the Melaka High Court in Criminal Application No. 44-2-1994 on 3 August 1994, Mohd Noor Ahmad J. held that common sense should prevail and "hearing" a representation does not prejudice the process of considering the representation of the applicant by the Board.

On my part, I am in complete agreement with the approach adopted by Mohd Noor Ahmad J. Further, in *Najar Singh v. Government of Malaysia & Anor.* [1974] 1 MLJ 138 at 140, 141, Suffian CJ (as he then was) held that the word "hear", which was not defined in the Federal Constitution which governs the matter, should be given its ordinary everyday meaning. The learned Chief Justice (as he then was) quoted the **Shorter Oxford Dictionary** in which "to hear" means "to listen to; to give audience to". It also means "to attend and listen to; to listen to judicially in a Court of law; to give (one) a hearing; to try a person or case."

In the same dictionary "to consider" means "to view attentively; to survey, examine, inspect; to look attentively; to contemplate mentally; to think over; to meditate or give heed to; to take note of; to think deliberately."

I also adopt the meaning of the word "hear" as contained in the **Shorter Oxford Dictionary** and hold that "to hear" a representation is to give consideration to the representation and therefore the hearing process would inevitably involve and include the process of considering which in turn would mean to think over, to meditate or give heed to or to take note of the representation. Therefore, by reference to the ordinary dictionary meaning of the word "hear", it seems clear to me that one cannot simply "hear" a representation without "considering" it.

Apart from the above dictionary meanings, the words "has considered" were judicially explained by Suffian LP in *Re Tan Boon Liat @ Allen & Anor*. [1977] 2 MLJ 108. In that case, Article 151(1)(b) of the Federal Constitution provides that "where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention ... no citizen shall be detained under the law or ordinance for a period exceeding three months unless an Advisory Board ... has considered any representation made by him ... and made recommendations thereon to the Yang di-Pertuan Agong". The learned Lord President held that the use of the words "has considered" necessarily implies that the intervention of the board is a prerequisite.

"Hearing" has also been judicially clarified by Sharma J. in *Merlimau Pegoh Limited v. Collector of Land Revenue, Jasin* in [1969] 2 MLJ 248 at 249. In that case, his Lordship held that in relation to the former Rules of Supreme Court, the expression "hearing of the suit" means the hearing at which the Judge takes down the evidence or hears argument or **considers** questions relating to the determination of the suit which enable him finally to come to an adjudication upon it.

In the light of the above authorities I have no doubt that the Board's process of hearing the applicants' representation means that the Board has intervened in relation to the representations of the applicants and considered questions relating to or arising out of the representations so as to enable the board to determine or decide on the recommendations to be made to the Yang di-Pertuan Agong. The process of hearing necessarily includes the process of considering i.e. taking into account all the issues raised in the applicants' representations which enable the Board finally to come to an adjudication upon it and therefore to make recommendations thereon to the Yang di-Pertuan Agong. In the circumstances, with due respect to learned Counsel for both the applicants, I am unable to uphold his submission that the Board has contravened s. 10(1) of the Act by merely hearing without considering.

In respect of second applicant Low Kok Boon, it is pertinent to recapitulate that in para 9 of his father's affidavit affirmed on 6 April 1994, it was stated that "the Advisory Board has considered the applicant's representation" ("Lembaga Penasihat telah menimbang representasi pemohon"). However in another affidavit affirmed on 4 August 1994 which was filed after learned Counsel for the second applicant has commenced his submission, the second applicant's father stated in para 3 that the Board heard the applicant's representations but denied that the Board has considered the second applicant's representations. There is a material contradiction in the two affidavits of the second applicant's father.

The second applicant's father explained that the contradiction was caused by the mistake of the solicitors' typist. Despite the contradiction, the second applicant's father is positive that the applicant's representation has been heard by the Advisory Board. That being the case, I apply and adopt my analysis and conclusion above that the process of hearing includes the process of considering. I am of the considered view that the respondents have discharged the burden of proving that the detention of both the applicants has not contravened s. 10(1) of the Act.

Counsel for both the applicants further submits that there is no evidence that the Yang di-Pertuan Agong has given the Minister any direction under s. 10(2) of the Act. He says that under s. 10(2), the function of the Yang di-Pertuan Agong is not mandatory, but once the Yang di-Pertuan Agong has given a direction to the Minister, then it must be proved that the direction originates from the Yang di-Pertuan Agong or there must be evidence that the Yang di-Pertuan Agong has delegated his power or function under s. 10(2) of the Act to some other person or body. It is also submitted that since there is no evidence from the Yang di-Pertuan Agong, the affidavit evidence of Encik Khalid Ahmad, the Secretary to the Board, to the effect that after hearing both the applicants' representations, the Board has made recommendations thereon to the Yang di-Pertuan Agong and upon considering the recommendations of the Board, the Yang di-Pertuan Agong has confirmed the detention order made by the Minister under s. 6(1), is hearsay evidence and is therefore inadmissible.

Learned Senior Federal Counsel contended that the detention of both the applicants was in accordance with the provisions of the Act generally and s. 10(2) in particular. He relies upon the decision of Mohtar Abdullah JC (as he then was) in *Zakaria bin Jaafar v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. & Anor. Application* [1989] 3 MLJ 316.

I have given the above submissions my most anxious and meticulous consideration and I am of the considered opinion that in the first place, the provisions of the Evidence Act 1950 in relation to hearsay rule do not apply to affidavits. Section 2 of the Evidence Act 1950 provides as follows:

> This act shall apply to all judicial proceedings in or before any Court, but not to affidavits presented to any Court or officer ...

Section 2 of the Singapore Evidence Act is substantially similar to our s. 2. The Singapore High Court in *Rie-Del-de-Hean AG v. Liew Keng Pang* [1989] 2 MLJ 400, has the occasion to decide on legal effect of s. 2. Section 2(1) of the Singapore Evidence Act provides as follows:

> Parts I, II and III shall apply to all judicial proceedings in or before any Court but not to affidavits presented to any Court or officer...

Chan Sek Keong J. held that under s. 2(1) of the Singapore Evidence Act, Parts I, II and III (which deals with evidence and witnesses) of the Singapore Evidence Act has no application to **affidavits** presented to any Court.

The Indian Evidence Act on which our Evidence Act was modelled also provides that the Act shall not apply to affidavits (see s. 1 of the Indian Evidence Act).

Therefore, the submission that the affidavit of Encik Khalid Ahmad has offended the hearsay rule in the Evidence Act 1950 cannot be upheld. Encik Khalid bin Ahmad, the

Secretary to the Advisory Board in his affidavit stated, in respect of both the applicants, that:

> On 14 July 1993, the Advisory Board made recommendations to the Yang di-Pertuan Agong. Upon considering the recommendations of the advisory Board, the Yang di-Pertuan Agong has confirmed the detention order made by the Minister under s. 6(1) of the Act against the applicants.

In the circumstances, it seems clear to me that the detaining authorities have established that the provisions of s. 10(2) have been complied with by the Board.

Further in *Zakaria bin Jaffar v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. & Anor. Application supra,* s. 10(2) of the Act came up for judicial decision by Mohtar Abdullah JC (as he then was). Similar submission was raised in that case by the applicants' learned Counsel to the effect that the affidavit evidence of the same Secretary Encik Khalid Ahmad is hearsay and therefore should not be admitted as evidence, in which event there is no admissible evidence as to the communication of the Yang di-Pertuan Agong's decision or direction to the Minister as regards the confirmation of the detention order by the Yang di-Pertuan Agong.

Mohtar Abdullah JC (as he then was) gave the following *dictum*:

> Section 10(2) provides that on receipt of the Advisory Board's report the Yang di-Pertuan Agong may, in his discretion, give any direction, if he thinks fit, to the Minister. If the detention order by the Minister is invalid, even the confirmation of it by the Yang di-Pertuan Agong will not save it (see *Re Tan Boon Liat @ Allen & Anor*). In the present cases, the fact that the detention orders were extended would imply their confirmation by the Yang di-Pertuan Agong. In the spirit of art. 151(b) of the Constitution, if the Yang di-Pertuan Agong has not so confirmed the orders, the applicants would not continue to be detained under the Act. The confirmation of the detention order against each applicant is therefore not a crucial issue in the present *habeas corpus* proceedings, and Encik Khalid's statement on this point is quite unnecessary to the determination of the validity of the detention orders. Whether it is admissible or not, it does neither add to nor detract from the validity of the detention order issued by the Minister. I hold that this ground is without merit.

I am in entire agreement with the above dictum of His Lordship. In the circumstances, I hold that the submission on s. 10(2) of the Act advanced for both applicants must fail.

Having regard to the provisions of s. 10(1) and (2) relied upon by both the applicants and also all the affidavits and the exhibits annexed thereto, I am of the considered view that the respondents have proved that the detention of both the applicants are in accordance with the law as contained in s. 10 of the Act and all the statutory procedural requirements prescribed thereunder. I therefore hereby dismiss these two applications.